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IN THE

Supreme Court of the United States

October Term, 1965

No. 659

FRANK ROSS,

Petitioner,

—versus—

F. E. STANLEY, et al.,

Respondents.

REPLY BRIEF FOR PETITIONER

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I. Since petitioner's claim is rooted in federal law, the time of its accrual presents an important federal question, which should be reviewed by this Court.

According to respondents, the application of the Florida statute of limitations can involve no question of federal law. Respondents misconceive the issue before this Court.

There is no dispute that the Florida statute of limitations controls, whether petitioner's claim rests on state or federal law; for where, as here, no limitation period is federally prescribed, even a federal claim is governed by the appropriate state statute of limitations. *Cope* v. *Anderson*, 331 U.S. 461, 463 (1947).

Nor is there any dispute that, under Florida law, the three-year limitation period did not begin to run until

"the plaintiff could first have maintained his action to a successful result" (Op. below, p. 6a).

The only, and decisive, question then is: When did petitioner's claim accrue so that he could have maintained an action thereon to a successful result?

This question, we submit, is one of federal law. Petitioner's claim, we have shown, is based on federal law; it arises from the regulatory scheme of the Natural Gas Act (Pet. pp. 10-13 and *infra,* Point II). It is thoroughly settled that the time at which a federal claim accrues for limitation purposes is determined by federal law, even though otherwise a state statute of limitations applies. *Rawlings* v. *Ray,* 312 U.S. 96, 98 (1942); *Fisher* v. *Whiton,* 317 U.S. 217, 218, 220 (1942); *Cope* v. *Anderson, supra,* (331 U.S. at 464); *Moviecolor Ltd.* v. *Eastman Kodak Co.,* 288 F. 2d 80, 83 (Cir. 2, 1961), cert. den. 368 U.S. 221.

In *Rawlings* and in *Fisher, supra,* this Court granted certiorari in order to determine the time at which the federal claims there involved accrued. The accrual issue here presents at least equally important and far-reaching questions (Pet. pp. 18-19).

II. The existence and extent of the fiduciary obligations of the directors of a natural gas company present a further important federal question, which should be reviewed by this Court.

According to respondents, the fiduciary duties of the directors of a natural gas company rest solely on state law, so that state law determines the time when a claim for breach of those duties accrues. Again respondents misconceive the issue.

Under the Natural Gas Act, as administered by the FPC pursuant to the "no-profit-to-affiliates" rule, the directors of a natural gas company and their associates are subject to the fiduciary principle that "a trustee ought not to make a profit dealing with a trust"; *St. Croix Falls M.I. Co.*, 3 F.P.C. 13, 21 (1942). This principle, arising as it does under the Act, is a rule of federal law. It supports petitioner's claim, whether or not state law recognizes fiduciary duties of equal breadth and scope.

In *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947), the directors of a utility holding company had purchased the company's preferred stock while the company was being reorganized under the Public Utility Holding Company Act. Although previously, in the first *Chenery* case (*S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 88-90 [1943]), the purchases had been held not to violate the directors' common law fiduciary duties, the SEC found the purchases to be contrary to the fiduciary standards it deemed requisite to the administration of the Utility Act. This Court, in the second *Chenery* case, sustained the SEC.

The analogy to the present case is clear and cogent. Neither the Utility Act nor the Natural Gas Act makes express provision for the fiduciary duties of the directors of the regulated companies. Nevertheless, the agencies charged with the administration of the statutes—the SEC there, the FPC here—acting under the authority of the statutes, have imposed such duties as a matter of federal law. In *Chenery*, this Court reviewed, and upheld, the fiduciary standards established by the SEC under the Utility Act. It should similarly review—and ultimately uphold—the fiduciary standards established by the FPC under the Natural Gas Act.

III. Even if petitioner's claim were based only on state law, review by this Court is imperative because of the serious error below and its grave impact on the administration of the Natural Gas Act.

Neither the Court below nor respondents have attempted to show how an action brought by petitioner in 1958 could have recovered as much as a dime. No losses or profits had arisen in 1958; there was no assurance that they would ever arise. To hold, as did the Court below, that petitioner's claim accrued in 1958 would mean that fiduciaries can be successfully sued for damages or profits which do not exist and may never come into existence. That is not and cannot be true, whether federal law, Florida law or any other law applies.

Respondents insist that in 1958 petitioner could successfully have demanded an accounting of the damages or profits that "would accrue". No authority—federal, Florida, or other—supports a right to an accounting for future and uncertain damages or profits. Common sense tells that one cannot account for what does not exist and may never exist. It is equal common sense that no "constructive trust" can be imposed on the profits of a fiduciary until he has them. Respondents had no profits until 1960, well within the statutory period.

Respondents suggest that the 1958 contracts constituted an "invasion of the plaintiff's rights", giving rise to nominal damages. Equity courts, however, do not award nominal damages; nor is there room for nominal damages in an action for breach of fiduciary duty (Pet. pp. 14, 16). The Court below expressly disclaimed reliance on nominal damages (Op. pp. 6a-7a).

Whether federal or Florida law governs, the Court below plainly misapplied it by outlawing petitioner's claim before it could be successfully asserted. This error, and its far-reaching and grievous consequences (Pet. pp. 18-19), urgently call for remedial action by this Court.

IV. The modification by the Court below of the District Court's decision to petitioner's detriment should be reviewed by this Court.

It is undisputed that, on petitioner's appeal, the Court below converted a dismissal without prejudice into one with prejudice. It is undisputed that this change was detrimental to petitioner. It is thoroughly settled that, absent a cross-appeal, an appellate court cannot change the lower court's decision to the appellant's detriment (Pet. pp. 19-20).

Respondents say that an appellate court may *affirm* on grounds other than those invoked by the first court; *Letulle* v. *Scofield,* 308 U.S. 415, 421 (1940). We agree; but it does not follow that the first decision may be *modified* to the detriment of the appellant.

Respondents say that petitioner waived this limitation of appellate jurisdiction by appealing from the entire judgment of the District Court (R 134) and by designating as error the dismissal of his profit claim as premature (R 135). There was no waiver. The cited documents sought a reversal in petitioner's favor. They did not consent to a modification detrimental to petitioner.

Respondents suggest that a modification detrimental to the appellant is permissible where the matter is closely related to the subject of the appeal. This Court never recog-

nized such an exception. In *Morley Construction Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937), such close relation certainly existed; this Court struck down the modification because it was detrimental to the appellant and no cross-appeal had been taken.

We submit that the errors below urgently call for the exercise of this Court's supervisory power. The writ of certiorari should be granted.

Respectfully submitted,

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November 26, 1965.

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of November, 1965, I have mailed copies of this brief, with airmail postage prepaid, to the attorneys for the respondents, to wit:

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